

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**E.A. Sween Co. and Teamsters Local Union No. 754,
affiliated with the International Brotherhood of
Teamsters.** Case 13–CA–45563

November 9, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 7, 2009, the General Counsel issued the complaint on October 20, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 13–RC–21777. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.¹

On November 10, 2009, the General Counsel filed a Motion for Summary Judgment. On November 13, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

On December 24, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB No. 117.² Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Seventh Circuit.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*,

¹ The Respondent's answer denies knowledge of the filing and service dates of the charge, but admits the charge was filed and served. A copy of the charge is included in the documents supporting the General Counsel's motion, showing the date of the charge as alleged, and the Respondent does not refute the authenticity of this document.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegate group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

On August 13, 2010, the Board issued a further decision, certification of representative, and Notice to Show Cause in Cases 13–CA–45563 and 13–RC–21777, which is reported at 355 NLRB No. 87. Thereafter, the Acting General Counsel filed an amended complaint in Case 13–CA–45563, the Respondent filed an amended answer, and the Acting General Counsel filed a brief in support of his Motion for Summary Judgment.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to the election.³

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

³ In its original answer and its amended answer, the Respondent specifically denies the allegations in complaint pars. 5(a), (b), (c), and (d), which allege, respectively, that the listed employees constitute an appropriate unit; that the unit employees selected the Union as their exclusive collective-bargaining representative in an election held on August 29, 2008; that the Union was properly certified; and that since August 29, 2008, the Union has been the exclusive collective-bargaining representative of the unit. The General Counsel has attached to his motion copies of the tally of ballots, dated August 29, 2008 (Exh. 2), and the decision, certification of representative, and Notice to Show Cause dated August 13, 2010 (Exh. B). The Respondent does not contest the authenticity of these documents. Accordingly, we find the relevant complaint allegations to be established to be true. Further, the appropriateness of the unit and the Union's status as the collective-bargaining representative of the unit were litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denials with respect to these allegations do not raise any litigable issues in this proceeding.

⁴ Thus, we deny the Respondent's requests that the complaint be dismissed with prejudice and that it be granted judgment for costs and attorneys' fees.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Minnesota corporation with an office and place of business in Woodridge, Illinois, has been engaged in the business of food distribution.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Woodridge, Illinois facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on August 29, 2008, in Case 13-RC-21777, the Union was certified on August 13, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers employed by Respondent out of its facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and guards, professional employees, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

On September 10, 2009, the Union, by Floyd F. Prusinski, requested that the Respondent meet to bargain collectively with it as the exclusive collective-bargaining representative of the unit. By letter dated October 6, 2009, and at all times since the Union's certification, the Respondent has declined the Union's request to meet and bargain. We find that this failure and refusal constitutes an unlawful failure to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce

within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.⁵

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, E.A. Sween Co., Woodridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employ-

⁵ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

ees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers employed by Respondent out of its facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and guards, professional employees, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Woodridge, Illinois, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁷ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 9, 2010

Wilma B. Liebman, Chairman

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁷ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Mark Gaston Pearce, Member

Briane E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time drivers employed by us out of our facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and guards, professional employees, and supervisors as defined in the Act.

E.A. SWEEN CO.